In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 457

BROOKLYN WATERFRONT TERMINAL CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 56-72) are reported in 90 F. Supp. 943.

JURISDICTION

The judgment of the Court of Claims was entered June 5, 1950 (R. 72). Plaintiff's motion for a new trial was filed June 26, 1950 and overruled on October 2, 1950 (R. 72). The petition for a writ of certiorari was filed on December 14,

1950. The jurisdiction of this Court rests upon 28 U.S.C. sec. 1255.

QUESTION PRESENTED

Whether under a lease of property to the United States for "Naval Purposes," the United States is liable for the cost of putting the petitioner's property in good repair and tenantable condition for the plaintiff's purposes in conducting a commercial warehouse business involving the storage of bagged and perishable foodstuffs, rather than the cost of putting the property in good repair and tenantable condition for the purposes for which the property was leased such as storage of naval gear and equipment.

STATEMENT

This suit was brought to recover damages for the alleged breach of covenants by the United States to maintain the petitioner's premises in good repair and tenantable condition and to restore the premises to the same condition as that existing at the time the Government entered upon the property in accordance with the terms of leases between the parties. As will appear more fully later, petitioner waived any claim based upon the covenant to restore and does not now seek review of claims as to various items which the Court disallowed as not supported by the weight of the evidence (Fdg. 26, R. 55, Pet. p. 3, fns. 1, 2). The facts material to the question sought to be reviewed, as

found by the Court of Claims may be summarized as follows:

On January 5, 1943, petitioner leased to the United States certain commercial warehouse property. The lease, which provided that the premises were to be used exclusively for "Naval Purposes", was renewable by the United States from year to year and was subject to cancellation by the Government upon 30 days' notice in writing. The United States duly renewed and extended the lease for successive annual periods to and including June 30, 1947. (R. Fdgs. 2, 3, R. 42-43.)

On July 1, 1947, the parties entered into a new lease covering approximately half of the storage space previously rented under the lease of January 5, 1943 (Fdg. 4, R. 43). The new lease was for the period July 1, 1947, to June 30, 1948. It also provided that the premises were to be used exclusively for "Naval Purposes". It contained the same provisions as to renewal and cancellation as the previous lease of January 5, 1943. This lease was duly terminated by the United States on December 31, 1947. (Fdg. 4, R. 43.)

Both leases contained the following provisions (Fdgs. 5, 6, R. 44-45):

> 8. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures, and erect additions, structures, or signs, in or upon the

premises hereby leased (provided such alterations, additions, structures, or signs shall not be detrimental to or inconsistent with the rights granted to other tenants on the property or in the building in which said premises are located); which fixtures, additions, or structures so placed in or upon or attached to the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, and the Government, if required by the Lessor, shall, before the expiration of this lease or renewal thereof, restore the premises to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted: Provided, however, that if the Lessor requires such restoration, the Lessor shall give written notice thereof to the Government thirty [1] days before the termination of the lease.

* * * * *

12. The Government shall maintain the said premises, buildings, equipment, piers, bulkheads, slips and appurtenances in good repair and tenantable condition during the continuance of this lease.

The premises were used by the United States exclusively for the storage of naval supplies and

[1] In the lease of July 1, 1947, there is a blank space between the words "Government" and "days," no number having been inserted.

during the Government's occupancy of petitioner's premises the sum of $100,851.66 was expended by the United States to improve and maintain the premises in good repair and tenantable condition for naval purposes (Fdgs. 14, 15, R. 50, 51).[2]

On March 17, 1947, and May 21, 1947, the petitioner wrote to the Commandant, Third Naval District, New York, requesting that repairs be made to the leased premises, and on December 10, 1947, in acknowledging the notice of termination of the lease of July 1, 1947, petitioner made demand for restoration and requested that repairs be undertaken (Fdgs. 9-10, R. 46-47). On January 13, 1948, the petitioner demanded prompt restoration and repair of the property and particularly the repair of leaders, gutters and roofs (Fdg. 10, R. 47). This letter was acknowledged on January 19, 1948, by an officer of the Government who stated, *inter alia* (Fdg. 10, R. 48):

> With respect to the alleged damaged condition of leaders, gutters, and roofs you are advised that the Navy Department does not propose to make any repairs to the premises but, should it be determined that a legal responsibility exists for such repairs to be made, you will be reimbursed for a reasonable cost of making such repairs to the property as are deemed necessary.

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[2] This sum included repairs to portions of the premises which are not involved here because they had been returned to the owners at various times in 1946 and 1947 and at the time of return, the United States was released of all liability as to those portions (Fdgs. 8, 15, R. 46, 51).

The court below found that "The proof adduced * * * establishes that the premises were kept in good repair and tenantable condition for the purposes for which the property was leased by the defendant, namely, naval purposes, such as storage of heavy gear and equipment" with certain exceptions which would cost an estimated $33,319.00 to repair (Fdg. 20, R. 53). The court below further found that to put the property in good repair and tenantable condition for the purposes required in the conduct of the petitioner's business (the conduct of commercial terminal and storage operations involving bagged and perishable foodstuffs such as sugar, coffee, and cocoa) would cost $172,321.62 (Fdgs. 21, 26, R. 54, 55). The court concluded that as a matter of law the petitioner was entitled to recover the sum of $33,319.00 (R. 55-56). The court's reason for this conclusion was, briefly, that under paragraph 12 of the lease, the United States was only required to maintain the premises in good repair and tenantable condition for the purposes for which the property was leased, any claim to restoration of the property to the condition it was in at the date of the lease having been waived and no evidence having been offered by the plaintiff as to the condition of the property at the inception of the lease. Judge Madden dissented (R. 70-72).

ARGUMENT

Petitioner's argument in support of its claim to $172,321.62, rather than the $33,319.00 which has been awarded by the Court of Claims, is based on the theory that the United States was obligated to put the premises in good and tenantable condition for petitioner's purposes and to keep it so, even if it were not in such condition when leased. (Cf. R. 66.) As the court below said (R. 66), this is "an extreme view and hardly within the contemplation of the parties as shown by the leases themselves and the circumstances surrounding their execution." Petitioner makes no attempt to show that the court's construction of the lease is erroneous under the circumstances, particularly the absence of any showing of the condition of the property at the time of the lease.[3] Thus, petitioner's position is that, regardless of the circumstances, the law requires that paragraph 12 be construed to impose such an extraordinary liability upon the United States. The authorities cited do not support such a view nor do they create a conflict of decision.

As the Court of Claims pointed out (R. 66-67), both the issue presented and the lease provision involved in *Girard Trust Co.* v. *United States,* 161 F. 2d 159 (C.A. 3), were different from those in the instant case and even petitioner is forced to ad-

[3] The dissenting opinion does not aid petitioner since it is based on the assumption that the property was in good repair and tenantable condition for commercial warehouse purposes, although petitioner made no attempt to prove that fact.

mit (Pet. p. 7) that the point here involved "was not expressly discussed" in the *Girard* case. The difference in wording of the covenants to repair and the absence, in the *Girard* case, of a covenant to restore cannot, as petitioner seeks (Pet. pp. 7-8), be ignored. We submit that the court below was plainly correct when it stated that while a lessee could be bound to repair pre-existing defects "it seems to us it ought to be spelled out with positive language and unrestricted by the covenants, as in the *Girard* case" (R.67).

Recognizing that the *Girard* case holds that this issue of construction of a federal contract is not controlled by the law of the place where the property is situated, petitioner nevertheless urges, without citation of supporting authority, that local law should conclude the matter. However, to support the view that New York law compels the construction urged by it, petitioner cites only one New York decision, *Lehmaier* v. *Jones,* 100 App. Div. 495, 91 N.Y. Supp. 687. But, aside from the fact that the lease covenants and the other circumstances were different from those presented here, that case is, at best, of doubtful authority, since *Lockrow* v. *Horgan,* 58 N.Y. 635, upon which it relies, had been in substance overruled by *May* v. *Gillis,* 169 N.Y. 330 (cf. R. 66). Apart from this one citation, petitioner makes no attempt to show that the analysis of the New York law by the Court of Claims was erroneous or that New York law is

different from that generally prevailing elsewhere (cf. R. 64-65).

Finally, petitioner's claim (Pet. p. 8) that an important question of federal law is presented because of reliance by the court below on *United States* v. *Bostwick,* 94 U.S. 53, when that case involved common law liability rather than an express covenant, plainly lacks merit since the Court of Claims recognized (R. 65-66) that the *Bostwick* case did not involve an express covenant.

CONCLUSION

The decision of the court below is clearly correct and the case does not warrant review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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JANUARY, 1951.

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